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(1) Supreme Court, U.S.
FILED

No. 07-129 JUL 30 2007

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In The

Supreme Court of the United States

MOUSTAFA ELDICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT S. GRISCTI, ESQ.
Counsel of Record
LAW FIRM OF ROBERT S. GRISCTI, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(352) 375-4460
Attorney for Petitioner Moustafa Eldick

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the United States Constitution require that a third-party unsecured creditor be granted standing under 21 U.S.C. § 853(n)(2) to contest the criminal forfeiture of property in which the creditor has a traceable legal interest?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:[1]

Moustafa M. Eldick, the Petitioner ("Petitioner"), individually;

United States of America, the Respondent (the "Government").

[1] The Defendant Mahmoud Eldick is not a party to this proceeding.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

United States of America v. Mahmoud Eldick (Defendant) Moustafa Eldick (Claimant-Appellant), 2005 U.S. Dist. LEXIS 41210 (N.D. Fla. Nov. 1, 2005), *affirmed*, 2007 U.S. App. LEXIS 4726 (11th Cir. Fla., Mar. 1, 2007).

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on March 1, 2007. App. 1. Petitioner Moustafa Eldick seeks review of that judgment on a writ of certiorari. On April 16, 2007, the Petitioner timely filed a petition for rehearing in the Court of Appeals. On May 1, 2007, the Court of Appeals filed an order denying the petition for rehearing. App. 16. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment V, Due Process Clause, which provides in relevant part that "[n]o persons shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves the standing of an unsecured creditor, Petitioner Moustafa Eldick, to contest criminal forfeitures of real and personal properties. The controlling criminal forfeiture statute is 21 U.S.C. § 853. App. 18-28.

The criminal Defendant, Mahmoud Eldick, illegally practiced medicine and fraudulently billed public and private health care insurers. He also fraudulently operated a pharmacy. He was indicted for a scheme to defraud health care benefit programs under 18 U.S.C. §§ 1347 and 2 and for dispensing a controlled substance under 21 U.S.C. § 841. App. 2-3; 9-10; 31; 33-37. The indictment included a criminal forfeiture count under 18 U.S.C. § 982. App. 38-39. The Defendant entered a plea of guilty and agreed to forfeit his interest in real and personal properties that derived, in part, from his false medical practice. App. 2-3.

The Petitioner Moustafa Eldick, Mahmoud's brother, a properly licensed physician and former business partner of the Defendant, sought return of his interests in specific forfeited assets traceable to his legitimate earnings as a medical practitioner, pursuant to the third party claim provisions under 21 U.S.C. § 853(n). App. 5-6; 9-10. The District Court granted the Government's motion for summary judgment, finding the Petitioner, who has no perfected security interest in the forfeited properties, did not have standing to contest the forfeiture. App. 9-15. The Petitioner appealed. The Court of Appeals, holding jurisdiction under 28 U.S.C. § 1291, filed its opinion on March 1, 2007. App. 1-8. The Petitioner sought rehearing, and on May 1, 2007, the Court of Appeals filed an order denying rehearing. App. 16-17. On May 30, 2007, the Court of Appeals filed an order granting the Petitioner's motion for

a stay of mandate pending the filing of a writ of certiorari to and including July 30, 2007. App. 29-30.

The District Court concluded that Petitioner was without standing to contest the forfeiture of various properties because he was an unsecured creditor of the Defendant, that "[u]nsecured creditors do not have standing to challenge forfeiture under 21 U.S.C.§ 853(n)," and that because the Petitioner had "no other argument," he was without standing to pursue his claims, citing *United States v. Watkins*, 320 F.3d 1279 (11th Cir. 2003). App. 11. The District Court did not hold a hearing to adjudicate the merits of Petitioner's claim. On appeal, the Petitioner relied upon the same evidence presented by summary judgment to the District Court and also argued that he had a legal interest based in constructive trust to pursue his third party claim, because in the course of his medical practice he had entrusted his income for professional services to his brother. Reviewing the judgment of the District Court *de novo*, the Court of Appeals found that "[w]e shall not consider for the first time on appeal whether a constructive trust could have been imposed in this case." App. 4 n.2. The Court of Appeals held that the Petitioner "has, at present, no legally cognizable interest in the forfeitable properties at all," and while he might be able to sue his brother for fraudulent conversion of the proceeds of the medical practice, he is "merely an unsecured creditor" without standing because his interest is not superior to that of the Government's, also citing *Watkins*, 320 F.3d at 1283-84. App. 5-6.

The decision of the Court of Appeals conflicts with a published decision of another United States Court of Appeals on the substantial question of whether a third party unsecured creditor who has a traceable legal interest in

property subject to criminal forfeiture should have standing to contest such forfeiture and protect his interests under 21 U.S.C. § 853(n)(2). The Court of Appeals for the Fourth Circuit held that an unsecured creditor, such as Petitioner, with an interest in the property subject to forfeiture has a "legal interest" sufficient to confer standing under Section 853(n)(2) to "bring an action to adjudicate his interest in the property." *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987).

Alternatively, the Court of Appeals as well as the District Court should have recognized a legal interest for standing under Section 853(n)(2) in the form of a constructive trust. If the Petitioner is deemed, as the Court of Appeals found, to have failed to use the precise terminology to present an equitable claim in the District Court, the Petitioner is denied the ability to interpose *any* interest in the forfeited properties. This is an unnecessary deprivation of due process. By upholding the decision of the District Court, the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, as to call for the exercise of supervisory power by the United States Supreme Court.

The Petitioner asks this Court to grant its petition for a writ of certiorari to harmonize the decision of the Court of Appeals with decisional law of another Circuit and to correct a result which, in contravention of the Due Process Clause of the Fifth Amendment, otherwise denies this Petitioner the "standing" to contest the forfeiture of assets in which he has legitimate, traceable property interests.

ARGUMENT

A. The Court of Appeals Decision Conflicts with an Opinion of Another Circuit Court.

The decision of the Court of Appeals conflicts with *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987) on the issue of standing. In *Reckmeyer*, as in the present case, the third party petitioners contesting forfeiture under 21 U.S.C. § 853(n) claimed "to have transferred to [the criminal Defendant] assets that were included within the forfeiture order but were not profits or proceeds of the criminal enterprise and therefore not forfeitable in the first instance." *Reckmeyer*, 836 F.2d at 206. The Fourth Circuit held that for standing analysis, unsecured creditors may have standing under § 853(n)(2) as third party claimants with a legal interest in the forfeited estate. The term "interest" "comprehends all forms of real and personal property," *id.* at 205, *citing Russello v. United States*, 464 U.S. 16, 21 (1983). Hence, a legal interest under § 853(n)(2) should encompass "all legally protected rights, claims, titles, or shares in real or personal property." *Id.*

The *Reckmeyer* Court also held that 21 U.S.C. § 853(n) requires more of petitioners for standing; a petitioner must be able to trace his interest to an asset that has been forfeited. *Id.* at 204-05.[2] In *Reckmeyer*, the Government had seized the criminal defendant's entire estate, such that general creditors could argue that their unsecured interest must be included among the forfeited assets. *Id.*

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[2] *See generally Warth v. Seldin*, 422 U.S. 490, 501 (1975) (to show standing, the litigant must allege a "distinct and palpable injury to himself" that is traceable to the "putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and is likely to be redressed by the requested relief, *Simon v. Eastern Kentucky Welfare Rights Organizations*, 426 U.S. 44-45 (1976).

at 206. The Fourth Circuit noted that in the usual case in which the Government seizes less than a defendant's entire estate, unsecured creditors cannot, by definition, trace their general interest to a particular seized asset. *Id.* at 206 n.3. Hence, the requirement that a claimant show an interest in the specific property forfeited is a "second hurdle" to the standing inquiry that "may well prove fatal to the claims of a number of general creditors." *Id.* at 206.

In the present case, that "second hurdle" to standing is overcome. The Petitioner in this case is a licensed medical practitioner. His legitimate services were billed to health care insurers and collected through a medical practice, Community Rural Health, Inc., by the Defendant, who is the Petitioner's brother. App. 5-6, 34-37. Unknown to the Petitioner, App. 10-11, the Defendant was practicing medicine illegally and fraudulently billing insurers through the same medical practice over which he established and maintained financial control. App. 9-10; 35-37. The Petitioner presented evidence that assets of the Defendant forfeited by the Government include assets of the Petitioner entrusted in good faith to the Defendant, for which he can trace his interest. App. 9-11. Accordingly, the Petitioner should be accorded standing, similar to the claimant in *Reckmeyer*. *See also United States v. Mageean*, 649 F. Supp. 820, 829 (D. Nev. 1986), *affirmed without opinion*, *United States v. Mageean*, 822 F.2d 62 (9th Cir. 1987).

Having once established a "legal interest" and therefore standing under § 853(n)(2), the forfeiture court should then adjudicate the merits of the creditor's claim under §§ 853(n)(6)(A) or (B). *Reckmeyer*, 836 F.2d at 206. The Court of Appeals in *Reckmeyer* determined that "in order to effectuate legislative intent the term 'bona fide purchaser for value' must be construed liberally to include all persons who

give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return." *Id.* at 208. The Court therefore concluded that "general creditors who have a legal interest in the forfeited estate and who gave valuable consideration to the estate without knowledge of the potential forfeitability of the defendant's assets may recover the value so conveyed under § 853(n)(6)(B)" as bona-fide purchasers for value. *Id.* at 207.

As in *Reckmeyer*, the Petitioner in the instant case is an unsecured creditor who gave valuable consideration to the criminal defendant's estate without knowledge of the potential forfeitability of the defendant's assets. Nonetheless, *Reckmeyer*'s ultimate holding on the merits of the third party claim in that case under § 853(n)(6)(B) is not necessary to reach in the present case. Standing to reach the merits is at issue. This case was resolved before the District Court and the Court of Appeals on summary judgment and never proceeded to the merits of Petitioner's claim. The Petitioner is prepared to establish at a final hearing on the merits of his forfeiture claim that, without knowledge of the criminal Defendant's fraud of health care insurers and other misconduct, he entrusted the earnings of his lawful medical practice to his brother, who in turn held real and personal properties that derived in part from those lawful earnings. The Petitioner should be granted standing to seek recovery of those traceable earnings in specific properties.

In the present case, the Court of Appeals and the District Court expressly relied on *United States v. Watkins*, 320 F.3d 1279 (11th Cir. 2003) to deny the Petitioner standing as an unsecured creditor. *Watkins* rejected the *Reckmeyer* court's more expansive definition of standing that "unsecured creditors of persons whose property is subject to forfeiture have a 'legal interest' in the debtor's

property." 320 F.3d at 1283, *citing Reckmeyer*, 836 F.2d at 205. *See also United States v. McCorkle*, 143 F. Supp. 2d 1311, 1320 (M.D. Fla. 2000) (citing decisions from the Court of Appeals for the Second, Sixth, and D.C. Circuits as the "majority rule . . . that unsecured creditors are not bona fide purchasers under § 853(n)(6)," and that "*Reckmeyer* is wrong").

The *Watkins* court noted that the Fourth Circuit in *Reckmeyer* had proceeded out of "concerns sounding in the deprivation of the due process rights of the debtor's unsecured creditors" where "the debtor's entire estate has been forfeited to the government." *Watkins*, 320 F.3d at 1283 n. 3. In *Watkins*, the petitioners sought recovery of sums of money, but could not trace their interests to the specific money seized by the government. *Id.* at 1281-83. Therefore, even if the Eleventh Circuit had adopted *Reckmeyer*'s definition of standing for unsecured creditors, the *Watkins* petitioners would still have failed to establish their entitlement to contest the forfeiture.

The Eleventh Circuit also rejected *Reckmeyer*'s more responsive definition of bona fide purchasers because "unsecured creditors do not fit the traditional definition of 'bona fide purchasers.'" *Id.* at 1283 (quoting *United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir. 1988)). In *Watkins*, the Eleventh Circuit reasoned that "[b]ecause their interest lies against the debtor personally as opposed to any specific property that they purchased from the debtor, unsecured creditors simply cannot be considered bona fide purchasers as that term is commonly defined." *Id.* at 1283-84.

The Eleventh Circuit's distinction between an interest against the debtor personally as opposed to an interest against a tangible piece of property is inapposite under

Reckmeyer's analysis. The *Reckmeyer* court, for example, noted that in the context of forfeiture, a bona fide purchaser could be a literal "purchaser" of some tangible thing, like a car, or a bona fide purchaser could also be a vendor of some tangible thing in exchange for money. *Reckmeyer*, 836 F.2d at 208. Instead, the *Reckmeyer* court focused on whether a third party petitioner engaged in an arms'-length transaction with the defendant, wherein the petitioner gave value to the defendant and received only fair exchange for what they gave. *Id.*

The *Reckmeyer* court, therefore, avoided constitutional concerns by defining a "bona fide purchaser" in the appropriate context, whereas the Eleventh Circuit declared flatly that the term "is a legal term of art, [and] we are unwilling to give the phrase an unnatural meaning only for the purpose of subsection (n)(6)(B)." *Watkins*, 320 F. 3d at 1284 (*quoting Campos*, 859 F.2d at 1238).

This distinction between *Watkins* and *Reckmeyer* on the ultimate issue of the Petitioner's ability to prove his claim, while not dispositive of the standing inquiry for third party claims that must be predicated on § 853(n)(2), is relevant to the underlying constitutional concerns of divesting the Petitioner of property without due process of law. Whether the Petitioner ultimately has a "vested," or "superior" or "bona fide purchaser" status under § 853(n)(6) is premature in this case. Repeatedly, the lower courts mix the standing analysis with an examination of a claimant's ultimate ability to prove his interest sufficiently to amend an order of criminal forfeiture under 21 U.S.C. § 853(n)(6). This is an inaccurate analysis that leads to third party claimants being divested of their "day in court."

In this case, the Petitioner has not been afforded the standing analysis required by the Fourth Circuit Court of Appeals in *Reckmeyer* and rejected by the Eleventh Circuit Court of Appeals in *Watkins* and the instant case. Because the Petitioner is an unsecured creditor who can trace his interest to specific forfeited properties, he has been deprived of his due process rights.

B. The Court of Appeals Decision Results in a Miscarriage of Justice that Requires the Exercise of Supervisory Power of the United States Supreme Court.

Alternatively, the Petitioner argued to the Court of Appeals that he had a legal interest to contest the forfeiture based on the equitable doctrine of constructive trust. The Petitioner relied on the same evidence presented to the District Court in summary judgment motion practice, but framed his claim as a "constructive trust." Nonetheless, the Court of Appeals affirmed: "We shall not consider for the first time on appeal whether a constructive trust could have been imposed in this case." App. 4 n.2. In its decision, the Court of Appeals did not consider decisions of other United States Courts of Appeals that have accepted that equitable remedies can be considered as legal interests superior to those of the Government. *See, e.g.*, *United States v. Schwimmer*, 968 F.2d 1570, 1582 (2d Cir. 1992); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991); *United States v. Marx*, 844 F.2d 1303, 1307-08 (7th Cir. 1988). Although its review was *de novo*, the Court of Appeals also did not consider substantial precedent that "an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of

justice." *Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994) (quoting *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984)). The present case thus offers a compelling opportunity for this Court to exercise its supervisory powers to correct the Court of Appeals' decision, which "departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure" by the District Court. Sup. Ct. R. 10(a).

First, the Petitioner's constructive trust argument is purely a matter of law, and no new facts need be developed in the record. The Petitioner presented competent and unrefuted evidence that the Defendant abused his confidential relationship with the Petitioner, who was his brother and business partner, and that the Defendant unjustly gained from that conduct. App. 9-11. By doing so, Petitioner has established the elements of a constructive trust in Florida, which are: "(1) a confidential relationship, by which (2) one acquires an advantage which he should not, in equity and good conscience retain." *Williams v. Dept. of HRS*, 522 So. 2d 951, 954 (Fla. 1st DCA 1988) (quoting *Steigman v. Danese*, 502 So. 2d 463, 467 (Fla. 1st DCA 1987), *review denied*, 511 So. 2d 998 (Fla. 1987)); *cf.*, *Bender v. Centrust Mortgage Corp.*, 51 F.3d 1027, 1029-30 (11th Cir. 1995).

A constructive trust is a "legal interest" which, to the extent established, is superior to the Government's under 21 U.S.C. § 853(n)(6)(A). Generally, the term "legal interest" has been recognized as encompassing both legal and equitable interests recognized "under the law." *United States v. Schwimmer*, 968 F.2d 1570, 1582 (2d Cir. 1992); *United States v. Reckmeyer*, 836 F.2d at 205. Various Courts of Appeals have concluded that a constructive trust can be exerted as superior legal interest on criminal forfeiture. *See*

Schwimmer, 968 F.2d at 1582-83 (only those assets which are traceable are held in constructive trust); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988) (dicta); *United States v. Marx*, 844 F.2d 1303, 1307-08 (7th Cir. 1988). *See also United States v. $4,225,945.57 in United States Currency*, 392 F.3d 1002 (9th Cir. 2004). The District of Columbia Circuit has disagreed. *United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1190-91 (D.C. Cir. 1995) (holding that a constructive trust, though a legal interest, was not an interest superior to the government's forfeiture claim); *see also United States v. Strube*, 58 F. Supp. 2d 576, 586 (M.D. Pa. 1999) (citing *BCCI Holdings*, held that a constructive trust was not a legal interest superior to a government forfeiture claim).

This Court should exercise its supervisory power and require that the Petitioner's "constructive trust" argument be considered. "Forfeitures are not favored." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). Without correction by this Court, the Petitioner's claim to contest the forfeiture of his property has been cut off altogether, resulting in a windfall to the Government, an injustice to the Petitioner, and a departure from the acceptable course of judicial proceedings.

Respectfully submitted,

ROBERT S. GRISCTI, ESQ.
Counsel of Record for Petitioner Moustafa Eldick
204 W. University Avenue, Suite 6
Gainesville, FL 32601
(352) 375-4460
Dated this 30th day of July 2007

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-10602

D.C. Docket No. 02-00038-CR-1-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

versus

MAHMOUD ELDICK,

Defendant,

MOUSTAFA ELDICK,

Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(March 1, 2007)

Before ANDERSON, MARCUS and HILL, Circuit Judges.

HILL, Circuit Judge:

Appellant, Moustafa Eldick, intervened in the underlying criminal action in which his brother Mahmoud plead guilty to health care fraud and drug offenses and agreed to the forfeiture of certain real properties and bank accounts owned by him or by entities under his exclusive control.

The district court held that Moustafa Eldick had no standing to challenge the forfeiture and entered judgment for the United States. Moustafa Eldick timely filed this appeal.

I.

Moustafa Eldick and his brother Mahmoud operated a medical practice in which both provided medical services to patients. Mahmoud, however, was not a licensed physician. He had secured a medical license and a registration number authorizing him to prescribe and dispense controlled substances through fraud. In addition to illegally practicing medicine, Mahmoud illegally operated a pharmacy to which the patients of the medical practice were directed to fill their prescriptions.

In 2002, Mahmoud was indicted for executing a scheme to defraud health care benefit programs in connection with the delivery of payment for health care benefits, in violation of 18 U.S.C. § 1347 and 2; and for dispensing a controlled substance in violation of 21 U.S.C. § 841. The indictment included a forfeiture count, specifying certain real properties, brokerage and bank accounts, all of which were either owned in Mahmoud's name or in the name of entities that he owned and over which he had exclusive control, and which the indictment alleged were purchased with proceeds from his fraudulent activities.

As part of his plea agreement, Mahmoud agreed to forfeit these properties. The government announced its intention to sell the forfeited properties and apply the proceeds to restore the victims, and the court entered a

restitution order in the amount of $1,009,661.62, listing numerous victims of Mahmoud's fraud.[1]

After the Preliminary Order of Forfeiture was entered, Moustafa Eldick intervened in this action, claiming that he has an interest in the forfeited properties that is superior to that of the government's. The government contended that Moustafa Eldick had no standing to challenge the forfeiture.

Both parties filed cross-motions for summary judgment on the issue of standing, and, after a hearing, the district court held that Moustafa Eldick had no standing in this action and entered judgment for the government. We review the judgment of the district court *de novo*. *United States v. Kennedy,* 201 F.3d 1324, 1329 (11th Cir. 2000).

II.

In any action by the government pursuant to 18 U.S.C. § 982(a)(7) to forfeit property derived from the proceeds of a federal health care offense, the interest of third parties is governed by 21 U.S.C. § 853. Under Section 853, standing to challenge the government's forfeiture is achieved in one of two ways. The claimant must either have a legal right, title, or interest in the property subject to forfeiture that is superior to that of the government, or be a bona fide purchaser for value. 21 U.S.C. § 853(n)(6)(A) and (B). Moustafa Eldick concedes that he is not a bona

[1] The Department of Justice has granted the U.S. Attorney's Office's request to pay the net proceeds of the sale of the subject properties to victims listed in the judgment in the criminal case. Any excess will be forfeited to the government.

fide purchaser; therefore, in order to have standing in this proceeding, he must have a legal right or interest in the forfeited property that is superior to that of the government.[2]

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[2] Although he sought to establish a legal interest in the property under the statute in the district court, on appeal Moustafa Eldick argues that he has an equitable interest in the properties under a theory of constructive trust. He concedes that he did not present this theory to the district court, but argues that he presented facts sufficient to support such a recovery. He contends that because he argued his entitlement to the "disgorgement" of the properties, that the district court should have recognized that he was asking for a constructive trust.

We disagree. There are a myriad of different remedies associated with the concept of "disgorgement." A plaintiff may not impose upon the district court the burden of sorting out the facts, deciding which legal theories apply, and deciding which one is his best avenue to recovery. This is his counsel's job.

Nor is the requirement that a plaintiff specifically ask the district court to impose a "constructive trust" a matter of mere semantics. The requirement that counsel present all theories of recovery to the district court is not a legal technicality; it is substantive one.

A theory of recovery is a claim. The claim defines the scope of the litigation and sets the parameters for the proceedings before the court. The claim informs the court which facts must be considered and which are legally irrelevant. The claim directs the court's attention to the legal issues raised by these facts, about which the court draws the appropriate legal conclusions. This is not a random process. It is driven from the beginning by the nature of the plaintiff's claim.

As we noted above, Moustafa Eldick chose to present a claim under the statute to the district court. He thereby defined the scope of this litigation and directed the district court to proceed under the statute. We do not agree that he presented the district court with the opportunity to consider or rule upon his present claim that he is entitled to the benefit of the imposition of a constructive trust on the forfeitable assets. We shall not consider for the first time on appeal whether a constructive trust could have been imposed in this case.

Moustafa Eldick asserts that he has an interest in the subject properties, bank and brokerage accounts that is superior to that of the government's because he, not his brother, is the *legal* owner of these properties. He claims that he "generated almost all the profits of the clinics." Furthermore, he notes, under applicable Florida law, he has a property interest in his professional services, and, therefore, in the profits derived therefrom. When his brother "secretly took the profits derived from [Moustafa Eldick's] professional services to purchase real property, to invest in the stock market, and to place in various bank accounts out of the reach of [Moustafa Eldick]," he was converting Moustafa Eldick's property interest in these profits to himself. Therefore, Moustafa Eldick concludes, he is the only brother who has a legally cognizable interest in the forfeitable properties, and this interest is, therefore, superior to the government's.

On the contrary, however, what this argument proves is that Moustafa Eldick has, at present, no legally cognizable interest in the forfeitable properties at all. His claim that he "owned" the proceeds of the practice and pharmacy and that these proceeds can be traced to the real properties and financial accounts owned by his brother at the time of his plea does not establish a legal interest in those properties. *United States v. BCCI Holdings (Luxembourg) S.A.*, 69 F. Supp. 2d 36, 59 (D.D.C. 1999). "A fraud victim who voluntarily transfers property to the defendant has a cause of action in tort against the defendant but has no greater interest in the forfeited property than does any other general creditor. Title to the funds in question no longer belongs to the victim; it belongs to the defendant." *Id. See also U.S. v. BCCI Holdings (Luxembourg), S.A. (Petition of BCCI Campaign Committee),* 980 F. Supp. 16

(D.D.C. 1997) (fraud victims – employees claiming defendant misappropriated their pension fund lack standing to contest forfeiture of defendant's assets); *U.S. v. BCCI Holdings (Luxembourg), S.A. (Petition of Republic of Panama),* 833 F. Supp. 29 (D.D.C. 1993).

Even if the proceeds of the practice could be traced to the forfeitable properties, and even if Moustafa Eldick "owned" them at the time they were fraudulently converted by his brother as he alleges, he would be, at most, an unsecured creditor of his brother's. He would have a cause of action against his brother for the fraudulent conversion of the proceeds of the practice and pharmacy. But as the holder of such a chose in action, Moustafa Eldick is merely an unsecured creditor. We have held that such a creditor does not have an interest in forfeitable properties that is superior to that of the government's. *Watkins,* 320 F.3d at 1283-84. Moustafa Eldick's interest in the forfeitable properties, therefore, is not superior to that of the government's in this proceeding.

Furthermore, whatever "ownership" interest Moustafa Eldick had in the proceeds of his brother's fraudulent medical practice was never superior to that of the government's. In order for a claimant's interest in forfeitable properties to be superior to that of the government, it must have vested *prior* to the crime giving rise to the forfeiture. A claimant in a forfeiture proceeding has an interest superior to that of the government's only if he:

> has a legal right, title or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant *at*

> *the time of the commission of the acts which gave rise to the forfeiture. . . .*

21 U.S.C. § 853(n)(6)(A) (emphasis added). In order to have a superior interest, then, the claimant must have had a legal right, title, or interest in the forfeitable properties that *preceded* the commission of the crime that gave rise to the forfeiture of that property. *United States v. Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003); *United States v. Hooper*, 229 F.3d 818, 822 (9th Cir. 2000) (criminal forfeiture statute protects only "two types of transferees of forfeitable property: bona fide purchasers and those whose interest in the property antedated the crime"). In *Hooper*, the Ninth Circuit concluded that the present incarnation of the criminal forfeiture statute "leads inevitably to the conclusion that § 853(n)(6)(A) is likely never to apply to proceeds of the crime."[3] This means that no third party could ever have an interest in the proceeds of the crime that is superior to that of the government's. *Id.*

This conclusion is supported by § 853(c) of the forfeiture statute, which provides that "[a]ll right, title, and interest in [forfeitable] property . . . of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section." Thus, the government's interest will be superior to that of anyone whose interest does not antedate the crime.

The proceeds of Mahmoud's practice, including any real properties purchased or bank or brokerage accounts funded with those proceeds, were all acquired after the

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[3] The court pointed out that the provision does, however, protect the owner of an instrumentality of the crime, as, for example, the wife whose husband uses the family car for drug trafficking. 229 F.3d at 822.

commission of his crime – the fraudulent practice of medicine and dispensation of drugs. At the moment of the commission of that crime, all proceeds of that crime and any property acquired with those proceeds became the property of the United States. Therefore, Moustafa Eldick's interest in the forfeitable properties is not superior to that of the government's. *Id.*

III.

Accordingly, as he has no interest that is superior to that of the government's in the forfeitable properties, Moustafa Eldick does not have standing to challenge the government's forfeiture of his brother Mahmoud Eldick's properties and the judgment of the district court is due to be

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES
OF AMERICA,

v.

CASE NO. 1:02-cr-00038-MP

MAHMOUD ELDICK,

Defendant.
_____/

ORDER

This matter is before the Court on claims under 21 U.S.C. § 853(n), filed by the defendant's brother, Moustafa Eldick, challenging the government's forfeiture of various assets as a result of the conviction of defendant. Both the government and Claimant Moustafa Eldick have moved for summary judgment, (the government at doc. 122, and Claimant at doc. 123). The parties have also jointly moved the Court (docs. 108 and 113) to defer any ruling on the admissibility of polygraph evidence until after the Court decides summary judgment. For the reasons which follow, the government's motion for summary judgment is granted and the Claimant's is denied.

The Preliminary Order of Forfeiture lists a total of 30 assets that are subject to forfeiture. (Doc. 66). Claimant Moustafa Eldick has filed a claim on asset numbers 1 through 23, most of which involve the false medical practice of Defendant Mahmoud Eldick. (Doc. 82) Claimant argues that his brother deceived him about whether he was a doctor and therefore the oral contract between the brothers was void. Since the contract between the Claimant and Mahmoud Eldick was void ab initio, Claimant

argues, he is an innocent owner and entitled to judgment as a matter of law with respect to the determination that Claimant is the true owner of all money paid to Community Rural Health and directly attributable to the services performed by the Claimant. As discussed more fully below, the Court rejects this argument, and finds that all assets are properly forfeited.

The Preliminary Order of Forfeiture was published on December 16, 23, and 30, 2003, and January 6, 2004, in the Palatka Daily News, a newspaper of general circulation. No claims have been filed as to asset numbers 24 through 30. There being no third party claims to be adjudicated, these assets should be ordered forfeited and disposed of according to law. The disposition of assets 1 through 23 is discussed below.

Asset #1, real property located at 126 South County Road 315, Interlachen, Putnam County, Florida, is one of the clinics that Defendant Mahmoud Eldick worked out of. (Ex. D, p. 82, Ex. F) This property was originally placed in Defendant Mahmoud Eldick's name. (Ex. F, H). While it was later purchased by Saadedine Aldick (Defendant Mahmoud Eldick's brother), the documentary stamps (.70¢) show that it, along with another property, were not arms length transactions. *Id.* Moreover, Saadedine Aldick has made no claim to any property in this proceeding. As noted above, the Claimant argues that Defendant Mahmoud Eldick purchased this asset using funds collected while the Defendant pretended to be a medical doctor. Claimant further argues that when Defendant collected payments fraudulently, the Defendant was in effect taking funds that should have been paid to Claimant. Thus, Claimant concludes, Claimant should be considered the rightful owner of the property, not Defendant. The

Claimant offers no case law supporting this point, and the Court agrees with the government that even if Defendant breached some kind of contract with the Claimant, that would merely make the Claimant an unsecured creditor of the Defendant. Unsecured creditors do not have standing to challenge forfeiture under 21 U.S.C. § 853(n). *U.S. v. Watkins,* 320 F.3d 1279, 1283-84 (11th Cir. 2003). Because Claimant has no other argument to support his claim to this asset, his claim should be denied.

Likewise, Asset #4, real property located at 1419 Husson Avenue, Palatka, Florida, was originally placed in Defendant Mahmoud Eldick's name, and later deeded to Saadedine Aldick for no consideration on August 29, 2002. (Ex. B, p. 37, 38; Ex. F, I) The Court agrees that this was not an arms length transaction and Saadedine Aldick has made no claim to the property. Having been purchased by Defendant Mahmoud Eldick during the commission of his crimes, these properties should be forfeited as Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1.

Asset #2, real property located at 2179 Bass Capital Drive, Crescent City, was the marital residence of Defendant Mahmoud Eldick and his wife Rola. (Ex. F, Doc 74) The property was purchased on April 16, 1999, during the time period of Defendant Mahmoud Eldick's crimes, and placed in Rola's name. *Id.* On December 29, 2003, Rola filed a Letter Motion for Reconsideration and to Set Aside Forfeiture of Property located at 217 Bass Capital Drive, Crescent City, Florida, 32112 (Doc. 74) The government responded (Doc. 79) and the Court denied the motion on March 1, 2004. (Doc 85) Rola Eldick has not filed a claim other than the letter. There being no claim filed other than that of Claimant, and since the Claimant offers

no argument for ownership other than the one rejected in the discussion of Asset #1, the marital home should be forfeited.

Asset #3 is real property located at 897 N. Summit St., Crescent City, Putnam County, Florida. This property was purchased by Defendant Mahmoud Eldick on July 15, 1999, during the time he was committing the crimes he was convicted of. (Ex. F) Since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, the property should be forfeited.

Assets #5, 6, 7, and 8 are real properties known as: 304-A and 304-B Cypress Ave., Crescent City; Parcel Number 30-12-28-1750-0020-0032, Putnam County, Florida; real property located at 33 South Summit Street, Crescent City, Putnam County, Florida; and real property located at 40 South Prospect Street, Crescent City, Putnam County, Florida. These properties were purchased by ETRA Enterprises, Inc., on November 9, 2001. *Id.* Defendant Mahmoud Eldick is both a Director and President of this corporation. *Id.* Furthermore, the address for ETRA is 215 Bass Capital Drive, Crescent City, Florida, Defendant Mahmoud Eldick's marital address. *Id.* The Claimant has testified that he has no interest in the corporation at all. (*See* The Corporate Entity section and record citation above) Since no claim has been filed by any person or entity other than Claimant, and since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, these parcels should be forfeited.

Assets #9, 10, 11, 12, 13, 14, and 15 are: parcels of real property known as 315 Central Ave., Crescent City; 31 South Summit Street, Crescent City; 311 Central Ave.,

Crescent City; Parcel #30-12-28-1750-0020-0041, Putnam County; 301 Central Ave., Crescent City; Parcel Number 30-12-28-1750-0020-0013; and 1 South Summit Street, Crescent City. According to the documentary stamps, these seven parcels were purchased by ETRA on October 26, 2001, for $150,000. (Ex. F) This is during the time period Defendant Mahmoud Eldick was committing the crimes he was convicted of. Other than Claimant's claim, no other claim has been filed on the parcels. Since Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, these properties should be forfeited.

Asset #16 is $192,530.62 in United States Currency. This currency was found in a safe located in Defendant Mahmoud Eldick's home during a consent search. (Doc. 49; Ex. B, p. 42) Defendant Mahmoud Eldick admitted that this money came from Community Pharmacy. *Id.* Claimant has admitted that he had no ownership or other interest in the pharmacy other than money he allegedly paid to pharmacy creditors to keep it open after Defendant Mahmoud Eldick's arrest. As discussed above, Claimant's voluntary payment at most makes him an unsecured creditor of Defendant and therefore does not satisfy the requirements of a third party under 21 U.S.C. 853(n)(6). Thus, the currency should be forfeited.

Assets #17, 18 and 19 are bank accounts located at Mercantile Bank. Account #8600168841 was opened on August 14, 2002, in the name of Defendant Mahmoud Eldick and his wife, Rola. (Ex. F) Both are authorized to sign on the account. *Id.* Rola filed a claim on this account based on her receipt of $29,354.08 from an insurance company settlement on a vehicle owned by her that was involved in an accident. (Ex. A) The Federal Bureau of

Investigation has advised that the government does not object to the Court awarding her $29,354.08 from this account with the balance being forfeited. Account #7600010165 (asset #18) is an account opened on March 25, 2002, in the name of Community Rural Health, Inc., Clinic Account. (Ex. F) The only authorized signature on the account is Defendant Mahmoud Eldick's. Claimant could not even write a check on the account. *Id.* While the corporate paperwork lists both Defendant Mahmoud Eldick and Claimant as directors until March 4, 2004, Claimant has testified that he was not aware of any involvement he had with that entity other than he worked there. (*See* record citations above) As such, since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, this account should be forfeited. Account #7600010176 (Asset #19) was opened on March 25, 2002, in the name of Community Rural Health, Inc., Pharmacy Account. (Ex. F) Defendant Mahmoud Eldick is the only person authorized to sign on the account. *Id.* Claimant has testified he had nothing to do with the pharmacy. Since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, this account should be forfeited.

Assets 20 and 21 are accounts located at First Federal Bank of North Florida. (Ex. F) Account #0000185821 was opened in the name of Community Rural Health, Inc., Pharmacy Account. *Id.* The only person authorized to sign on it is Defendant Mahmoud Eldick. *Id.* Claimant has already disavowed any connection with the pharmacy. As such, and since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, the account should be forfeited. Account #0000184279 was opened in the name of Community

Rural Health, Inc. *Id.* The only person authorized to sign is Defendant Mahmoud Eldick. *Id.* Since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, this account should be forfeited.

Assets 22 and 23 are Ameri-Trade accounts in the name of Defendant Mahmoud Eldick. The only person authorized to sign on the account is Defendant Mahmoud Eldick. *Id.* In one of the accounts, Defendant Mahmoud Eldick used the alias Mahmoud "Aldique." Since these are personal accounts of Defendant Mahmoud Eldick, and since the Claimant offers no argument for ownership other than the one rejected in the discussion of Asset #1, these accounts should be forfeited.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

The motions to defer ruling, etc. (doc. 108 and 113) are granted to the extent that the Court has deferred ruling on the admissibility issues, and denied as moot based on the instant order.

Doc. 122, the Government's motion for summary judgment, is granted, and all 23 assets discussed above are declared properly forfeitable.

Doc. 123, the Claimant's motion for partial summary judgment, is denied.

DONE AND ORDERED this *1st* day of November, 2005.

s/ Maurice M. Paul
Maurice M. Paul, Senior District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-10602-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAHMOUD ELDICK,

Defendant,

MOUSTAFA ELDICK,

Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(Filed May 1, 2007)

BEFORE: ANDERSON, MARCUS and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

Administrative File

May 01, 2007

Appeal Number: 06-10602-AA
Case Style: USA v. Moustafa Eldick
District Court Number: 02-00038 CR-1-MMP

CC: Paul Michael Meredith

CC: Robert S. Griscti

CC: Robert Del Stinson

CC: E. Bryan Wilson

CC: Administrative File

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21 USCS § 853

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title (21 U.S.C. 848), the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part [21 USCS §§ 841 et seq.], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property". Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers. All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption. There is a rebuttable presumption at trial that any property of a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that –

(1) such property was acquired by such person during the period of the violation of this title or title III or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this title or title III.

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any

other action to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates

that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit

(A) In general. Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply. Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution. Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property. Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall

not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General. With respect to property ordered forfeited under this section, the Attorney General is authorized to –

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this title, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 511(e) of this title (21 U.S.C. 881(e)), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions. Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. 881(d)) shall apply to a criminal forfeiture under this section.

(k) Bar on intervention. Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may –

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders. The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions. In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any

witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests.

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under

this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction. The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property.

(1) In general. Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant –

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property. In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the

defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction. In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites. The court, when sentencing a defendant convicted of an offense under this title or title III involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall –

(1) order restitution as provided in sections 3612 and 3664 of title 18 United States Code [18 §§3612 and 3664];

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18, United States Code [18 USCS § 3663A].

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-10602-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAHMOUD ELDICK,

Defendant,

MOUSTAFA ELDICK,

Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(Filed May 30, 2007)

ORDER:

( ) The motion of Appellant, Moustafa Eldick, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of Appellant, Moustafa Eldick, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *July 30, 2007*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the

certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ James C. Hill
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA

v.

MAHMOUD ELDICK
a/k/a Mahmoud Aldique /

INDICTMENT

[1:02cr38 /s/ MMP]

THE GRAND JURY CHARGES:

COUNT ONE

A. INTRODUCTION

At all times material to this indictment, unless otherwise provided:

1. Health insurance for the aged, commonly known as the MEDICARE program, was provided for by the Social Security Act. Under this law, administered by the U.S. Department of Health and Human Services (HHS), the federal government pays the costs of certain health care expenses for individuals age 65 and older, who are entitled to Social Security benefits, and certain other disability benefits.

2. The Centers for Medicare & Medicaid Services (CMMS), formerly known as the Health Care Financing Administration (HCFA), was a part of the Department of Health and Human Services (HHS) and was the governmental agency charged with carrying out the provisions of the Medicare Act. HCFA/CMMS contracts with a paying agent (also known as a fiscal intermediary) who received, audited, and paid claims for a particular geographical

area. The program was generally divided into Medicare Part A (Hospital Insurance) and Medicare Part B (Medical/Physician Insurance) coverage. The Medicare Part B program was administered in Florida by First Coast Service Options, Inc. (FCSO) (formerly by Blue Cross Blue Shield of Florida, Inc.) which, pursuant to a contract with HHS, served as a fiscal intermediary to receive, adjudicate, and pay Medicare Part B claims submitted to it by Medicare beneficiaries, physicians, or suppliers of medical services. Medicare Part B reimbursed 80 percent of the reasonable and customary charges of most medically necessary services which were personally performed pursuant to a licensed provider's order and under a licensed provider's personal and immediate supervision. For a charge to be payable, the service must have been medically necessary for the treatment of the beneficiary and performed by a licensed provider.

3. Under the Medicare program, health care providers, such as physicians, filed claims with FCSO for payment of medical services and procedures provided to Medicare beneficiaries. Physicians and other practitioners providing services covered by Medicare Part B were required to submit a claim for payment to FCSO on a CMMS Claim Form by mail or by using an electronic claims system.

4. The Medicaid system was designed under the Social Security Act (Title 42, United States Code, Section 301, *et seq.*) for the payment of medical costs associated with the treatment of indigent patients. The Medicaid System was administered by each state individually, but was funded in part with federal funds. HHS provided federal funding to the State of Florida Medicaid System which was governed by the Florida Agency for Health Care

Administration (AHCA) pursuant to contracts with HHS. AHCA in turn contracted with Affiliated Computer Services, Inc. (ACS) (formerly with Consultec, Incorporated) which (like CMMS and its relationship with Medicare) was a fiscal intermediary designated to serve as the paying agent. ACS received, adjudicated and paid Medicaid claims submitted by Medicaid participating providers, and reimbursed most medically necessary services performed, ordered, and/or supervised by a *licensed* physician based upon an established fee schedule. Florida physicians and other health care providers submitted claims for payment to ACS (formerly to Consultec) via mail or electronic submission on a "Health Insurance Claim Form." ACS was responsible for adjudicating these claims and making payment to individual providers based upon the claim submitted. The payments were issued from Tallahassee, Florida.

5. The Florida Department of Health (DOH), Office of Medical Quality Assurance, Tallahassee, Florida, regulated the licensing and practice of medical doctors and other medical practitioners. The state laws concerning the practice of medicine were set forth to ensure that every physician and/or medical doctor practicing in Florida meets the minimum standards and requirements for safe practice. The DOH prohibited medical doctors and physicians from practicing in Florida when they fell below the minimum competency and/or licensing requirements or otherwise presented a danger to the public.

6. In 1992, MAHMOUD ELDICK a/k/a Mahmoud Aldique used false identification documents to obtain a State of Florida pharmacist license.

7. In or about May, 1995, MAHMOUD ELDICK used the medical credentials of Abdul Rahman Shatila to apply for and receive a license to practice medicine in the State of Florida.

8. On or about November 30, 1995, MAHMOUD ELDICK fraudulently petitioned for a name change from Abdul Rahman Shatila to Mahmoud Aldique in Palm Beach County, Florida. The petition was granted on December 6, 1995.

9. In or about January, 1996, MAHMOUD ELDICK presented documentation of the "Shatila-Aldique" name change to the Florida Department of Health and thereafter received a license to practice medicine in the name of Mahmoud Aldique.

10. In or about June, 1996, MAHMOUD ELDICK obtained an occupational license from Palm Beach County, Florida, and practiced as a medical doctor in the name of Mahmoud Aldique at the Primary Care Medical Center, Lake Worth, Florida.

11. In or about September, 1998, MAHMOUD ELDICK, a/k/a Mahmoud Aldique and Moustafa Eldick created, incorporated, and established Community Rural Health, Inc., a medical care and treatment facility located at 899 Summit Street, Crescent City, Florida.

B. THE SCHEME

12. Between in or about January, 1997, and continuing through September, 2002, in the Northern District *of* Florida and elsewhere, the defendant,

MAHMOUD ELDICK,
a/k/a Mahmoud Aldique,

did knowingly and willfully execute and attempt to execute a scheme and artifice to defraud health care benefit programs, namely, Medicare, Medicaid, Tricare, Blue Cross Blue Shield of Florida, Mail Handlers, Well Point Health Networks, Allianz Life Insurance Company of North America, and Humana, and to obtain, by means of false pretenses, representations and promises, money and property owned by, and under the custody and control of the above-named health care benefit programs, medical claims in excess of $2,000,000.00, in connection with the delivery of and payment for health care benefits, items and services.

C. MANNER AND MEANS

13. It was a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would steal and misappropriate the identity of Abdul Rahman Shatila, a physician licensed in the State of Ohio, to falsely and fraudulently obtain a medical license from the Florida Department of Health, and to then falsely change the name of Abdul Rahman Shatila to Mahmoud Aldique.

14. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would move to Putnam County, Florida, and open a medical treatment facility with his brother, Moustafa Eldick, a physician licensed in the State of Florida, and incorporate it in the name of Community Rural Health, Inc., located at 899 Summit Street, Crescent City, Florida.

15. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would

file applications with Medicare, Medicaid, and other governmental and private medical care insurers to obtain reimbursement by making claims for patient treatment rendered at Community Rural Health, Inc.

16. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would apply for a federal employer identification number (EIN) for Community Rural Health, Inc.

17. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would open a bank account for Community Rural Health, Inc. and that MAHMOUD ELDICK would have sole signature authority on that account.

18. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would incorporate Community Pharmacy, Inc., so that MAHMOUD ELDICK a/k/a Mahmoud Aldique and Moustafa Eldick could have their patients fill prescriptions at Community Pharmacy, thereby obtaining reimbursement for those prescriptions from Medicare, Medicaid, and other medical insurers used by the patients treated at Community Rural Health.

19. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique would falsely and fraudulently obtain a physician's Drug Enforcement Administration (DEA) registration number, which allowed him to dispense and possess with intent to dispense Schedule II, III, IV and V narcotic and non-narcotic controlled substances.

20. It was further a part of the scheme and artifice that MAHMOUD ELDICK a/k/a Mahmoud Aldique and

Moustafa Eldick would open and operate a second Community Rural Health medical treatment facility at 126 County Road 315 South, Interlachen, Florida, to increase the number of patients they treated and the amount of money they would receive by reimbursement.

D. EXECUTION OF THE SCHEME

During and between January, 1997, and September, 2002, in the Northern District of Florida and elsewhere, for the purpose of executing and attempting to execute the scheme and artifice to defraud and to obtain money and property by false and fraudulent, pretenses, representations and promises, the defendant obtained money from the health care benefit programs identified in paragraph 12 above by filing claims in which defendant falsely represented that he was a physician licensed in the State of Florida and was authorized to perform medical services and to obtain reimbursement for those services, when in truth and fact, and as the defendant then well knew, he had never obtained a Doctor of Medicine degree, he was not a licensed physician, and was neither authorized to perform medical services nor authorized to obtain reimbursement for such services.

All in violation of Title 18, United States Code, Sections 1347 and 2.

COUNT TWO

22. That in or about September, 2002, in the Northern District of Florida and elsewhere, the defendant,

MAHMOUD ELDICK,
a/k/a Mahmoud Aldique,

did knowingly and willfully dispense, and caused to be dispensed, a quantity of hydrocodone, a Schedule III controlled substance.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

FORFEITURE ALLEGATION

The allegations of Count One of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America.

Upon conviction of the offense alleged in Count One of this Indictment, defendant MAHMOUD ELDICK a/k/a Mahmoud Aldique shall forfeit to the United States of America pursuant to 18 U.S.C. § 982(a)(7), all property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense. If any of the forfeitable property, as a result of any act or omission of the defendant:

(i) cannot be located upon the exercise of due diligence;

(ii) has been transferred or sold to, or deposited with, a third party;

(iii) has been placed beyond the jurisdiction of this court;

(iv) has been substantially diminished in value; or

(v) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p)(1) as incorporated by 18 U.S.C. § 982(b), to seek forfeiture of any other property of said defendant.

A TRUE BILL:

/s/ [Illegible]
FOREPERSON

10/22/02
DATE

/s/ Gregory R. Miller
GREGORY R. MILLER
United States Attorney

/s/ R. Jerome Sanford
R. JEROME SANFORD
Assistant United States Attorney

FILED
NOV 3 0 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-129

In the Supreme Court of the United States

MOUSTAFA ELDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner has standing under 21 U.S.C. 853(n)(2) to contest the criminal forfeiture of property that represents the proceeds of another person's crimes.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 223 Fed. Appx. 837. The order of the district court (Pet. App. 9-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2007. A petition for rehearing was denied on May 1, 2007 (Pet. App. 16-17). The petition for a writ of certiorari was filed on July 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner's brother, Mahmoud Eldick, pleaded guilty in the United States District Court for the Northern District of Florida to one count of health care fraud, in

violation of 18 U.S.C. 1347, and one count of distributing hydrocodone, in violation of 18 U.S.C. 841(a)(1). After Mahmoud agreed to the forfeiture of certain real property and accounts, petitioner intervened and attempted to challenge the forfeiture. The district court held that petitioner lacked standing to challenge the forfeiture, and the court of appeals affirmed. Pet. App. 1-8.

1. Petitioner and Mahmoud operated a medical practice in Florida. They both provided medical services to patients, but Mahmoud was not a licensed physician. Mahmoud had fraudulently obtained, in a false name, a medical license and a registration number that allowed him to prescribe controlled substances. Mahmoud also illegally operated a pharmacy to which petitioner and Mahmoud referred their patients. Pet. App. 2.

In 2002, Mahmoud was charged with executing a scheme to defraud health care benefit programs and with dispensing controlled substances. The indictment contained a forfeiture count calling for the forfeiture of certain real property and brokerage and bank accounts. As part of a plea agreement, Mahmoud agreed to forfeit those properties pursuant to 18 U.S.C. 982(a)(7), which mandates the forfeiture of property "that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of" a federal health care offense. The United States informed the court that it would use the forfeited assets to compensate the victims of Mahmoud's fraud. Pet. App. 2.

2. After the district court entered a preliminary order of forfeiture, petitioner intervened and claimed that he had an interest in the forfeitable properties that was superior to the government's interest. Pet. App. 3. Forfeitures under Section 982 are governed by 21 U.S.C. 853 (2000 & Supp. V 2005), see 18 U.S.C. 982(b)(1),

which provides that "[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States * * * may * * * petition the court for a hearing to adjudicate the validity of his alleged interest in the property." 21 U.S.C. 853(n)(2). Such a third party must show that he either:

> (A) * * * has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) * * * is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. 853(n)(6).

Petitioner argued that his brother purchased the forfeitable assets with funds that he had unlawfully appropriated from petitioner, and that the assets therefore belonged to petitioner, not his brother, and were not subject to forfeiture for that reason. See Pet. App. 10. The district court rejected that contention because even if petitioner's allegations were true, "that would merely make [petitioner] an unsecured creditor of [Mahmoud]." *Id.* at 11. The court explained that "[u]nsecured creditors do not have standing to challenge forfeiture under" Section 853(n). *Ibid.*

3. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1-8. The court explained that because petitioner "concedes that he is not a bona fide purchaser" under Section 853(n)(6)(B), he could establish standing only by showing that he had "a legal right or interest in the forfeited property that is superior to that of the government" under Section 853(n)(6)(A). Pet. App. 3-4.

The court of appeals determined that, under his own theory, petitioner had "no legally cognizable interest in the forfeitable properties at all." Pet. App. 5. Petitioner argued that his work generated nearly all of the health clinic's profits, that he was therefore entitled to those profits, and that Mahmoud used those profits to buy the assets in question. *Ibid.* The court explained that petitioner "would have a cause of action against his brother for the fraudulent conversion of the proceeds of the practice and pharmacy," but that "as the holder of such a chose in action, [petitioner] is merely an unsecured creditor" without a legal interest in the particular assets in question. *Id.* at 6. The court declined to consider petitioner's argument that he had a legal interest in the properties under a state-law constructive trust theory, because petitioner "concede[d] that he did not present this theory to the district court." *Id.* at 4 n.2. The court rejected petitioner's argument that he had sufficiently preserved the issue by presenting sufficient facts and generally arguing for "disgorgement," because "[a] plaintiff may not impose upon the district court the burden of sorting out the facts, deciding which legal theories apply, and deciding which one is his best avenue to recovery." *Ibid.*

In addition, the court of appeals determined that, even if petitioner had a legal interest in the properties,

that interest was not superior to the government's. Pet. App. 6-8. "All right, title, and interest in [forfeitable] property * * * vests in the United States upon the commission of the act giving rise to forfeiture." 21 U.S.C. 853(c). Thus, the court explained that, in order for a claimant to have an interest superior to the United States' interest, "the claimant must have had a legal right, title, or interest in the forfeitable properties that *preceded* the commission of the crime that gave rise to the forfeiture of that property." Pet. App. 7. Here, however, "[t]he proceeds of Mahmoud's practice, including any real properties purchased or bank or brokerage accounts funded with those proceeds, were all acquired after the commission of his crime." *Id.* at 7-8. The court concluded that, because petitioner "has no interest that is superior to that of the government's in the forfeitable properties," he "does not have standing to challenge" the forfeiture. *Id.* at 8.

ARGUMENT

Petitioner contends (Pet. 5-10) that the court of appeals erred in holding that he lacks standing to contest the forfeiture. That claim lacks merit, does not implicate a circuit split, and does not warrant further review.

1. As the court of appeals held, petitioner does not have a legal interest in the forfeitable properties. Pet. App. 5-6. Petitioner has argued that Mahmoud acquired those properties with funds he had misappropriated from petitioner. See, *e.g.*, *id.* at 5. If true, that means that petitioner had a legal interest in funds that were diverted from him. But it does not mean that petitioner has a legal interest in any specific properties that Mahmoud purchased with those funds. See *id.* at 5-6.

Petitioner tries (Pet. 10-12) to bridge that gap with a state-law constructive trust theory. The court of appeals declined to address that asserted basis for an ownership interest in the forfeitable property, however, because petitioner "concede[d] that he did not present this theory to the district court." Pet. App. 4 n.2. The court of appeals acted well within its discretion in declining to consider that unpreserved claim, especially considering that it would have required the appellate court to determine, in the first instance, whether the requirements for a constructive trust under Florida law were satisfied. See Pet. 11 (invoking Florida law). Absent his untimely claim of a constructive trust, petitioner offers no legal theory for treating Mahmoud's properties as if they legally belonged to petitioner. Cf. Pet. 2 (conceding that petitioner "has no perfected security interest in the forfeited properties").*

The requirement that a claimant have a legal interest in the specific property to be forfeited (as opposed to a general claim against a criminal defendant) serves the important function of preventing forfeiture proceedings from devolving into general-purpose liquidation proceedings. *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1191-1192 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995). If general unsecured creditors could seek recovery in forfeiture proceedings, such proceedings would be unwieldy. Congress chose instead to permit the Attorney General to forfeit property in such circumstances, and then to exercise his discretion as to the appropriate disposition of the forfeited prop-

* Because the court of appeals acted within its discretion in declining to consider the constructive trust theory, petitioner's citation (Pet. 11-12) of various cases approving or disapproving such theories does not provide a basis for this Court's review.

erty. See 21 U.S.C. 853(i). Here, the United States has made clear that it intends to distribute the assets to Mahmoud's victims. See Pet. App. 2. If petitioner believes that he is one of those victims, he is free to petition the Attorney General for his fair share of the forfeitable properties. See 21 U.S.C. 853(i)(1). But he may not demand that a court award all or nearly all of those assets to him and him alone.

2. Even if petitioner had a legal interest in the relevant properties, he would have to show either that his "legal right, title, or interest in the property * * * was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or that he was a bona fide purchaser for value of the forfeitable properties. 21 U.S.C. 852(n)(6). Petitioner is neither.

As the court of appeals held, petitioner lacked a superior interest in the forfeitable properties at the time of the acts giving rise to forfeiture. See Pet. App. 6-7. The properties represent "[t]he proceeds of Mahmoud's practice, including any real properties purchased or bank or brokerage accounts funded with those proceeds," and "were all acquired *after* the commission of his crime." *Id.* at 7-8 (emphasis added). Because Mahmoud did not acquire the properties until after he committed the fraud, petitioner could not have had a superior interest in *those* properties at the time he was allegedly defrauded, as required by Section 853(n)(6)(A). Rather, upon commission of the offenses, "[a]ll right, title, and interest in [forfeitable] property * * * vest[ed] in the United States." 21 U.S.C. 853(c).

The petition for a writ of certiorari does not appear to dispute that point. Instead, petitioner argues in this Court (Pet. 6-9) that he is a bona fide purchaser for

value under Section 853(n)(6)(B). As the court of appeals explained, however, petitioner "concede[d]" below "that he is not a bona fide purchaser." Pet. App. 3-4. Because petitioner had conceded that question, the court of appeals did not address it. Thus, petitioner has forfeited his bona fide purchaser for value claim. Moreover, petitioner is not a bona fide purchaser of the forfeited property because he never purchased that property. Instead, he is merely an unsecured creditor of Mahmoud.

Petitioner suggests (Pet. 9) that the standing question turns only on whether he has a legal interest under Section 853(n)(2), not on whether he can also satisfy the superior-interest or bona-fide-purchaser requirements of Section 853(n)(6). Petitioner cites no basis for that assertion. Even if he were right, that contention would not assist him for two reasons. First, petitioner lacks a legal interest in the relevant properties, as discussed above. Second, the parties briefed, and the court of appeals reached, the question whether any interest of petitioner's was superior under Section 853(n)(6)(A). See, *e.g.*, Gov't C.A. Br. 26; Pet. C.A. Reply Br. 2 (arguing that petitioner's "property interests are superior"); Pet. App. 6-8. No further evidentiary development would be relevant to that inquiry, because it turns on the timing of Mahmoud's acquisition of the assets in question, which appears to be undisputed. Thus, the court of appeals committed no error in considering that question, much less an error that would warrant this Court's review.

3. Petitioner argues (Pet. 5-10) that the court of appeals' decision conflicts with the Fourth Circuit's 20-year-old decision in *United States* v. *Reckmeyer*, 836 F.2d 200 (1987). There is no conflict. In that case, one

claimant had loaned the defendant $25,000 in exchange for an option to purchase a parcel of land for that amount in the future. *Id.* at 202. Another claimant had delivered $38,900 in gems to the defendant, and had retained title to the gems, pending the defendant's sale of the gems to third parties. *Ibid.* The court held that the claimants had a legal interest in the defendant's property. It emphasized that general creditors "cannot claim an interest in any particular asset that makes up the estate." *Id.* at 206. In that case, however, the government had forfeited *all* of the defendant's assets, which meant, in the court of appeals' view, that the claimants' "interests necessarily lie within the estate." *Ibid.* The court then concluded that the claimants could recover because they were bona fide purchasers for value under Section 853(n)(6)(B). *Id.* at 207-208; see *id.* at 208 ("We conclude that * * * the term 'bona fide purchaser for value' must be construed liberally to include all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return.").

Petitioner asserts (Pet. 7-9) that courts of appeals have disagreed with *Reckmeyer's* holding that unsecured creditors can be bona fide purchasers for value. Any conflict on that question is irrelevant here, however, because the court of appeals did not reach that question in light of petitioner's concession that he was not a bona fide purchaser. See Pet. App. 3-4; cf. *United States* v. *Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003) (citing *Reckmeyer* for the proposition that "[t]he courts of appeals are split on whether an unsecured creditor may be considered a bona fide purchaser under § 853(n)(6)(B)").

Moreover, the facts of *Reckmeyer* were far different from the facts here. In that case, the claimants engaged in separate arms-length transactions with the defendant, and the court held that the claimants had a legal interest in the seized properties because the government had seized *all* of the defendant's property. *Reckmeyer*, 836 F.2d at 202, 205-206. In this case, in contrast, petitioner alleges that Mahmoud defrauded him in the course of his fraudulent practice of medicine and dispensation of drugs, and petitioner relies on a different traceability theory—that most of Mahmoud's income properly belonged to petitioner, and that Mahmoud's purchases should therefore be attributed to petitioner for this purpose. See Pet. App. 5. As a factual matter, petitioner's traceability argument is implausible, because Mahmoud made millions of dollars by defrauding patients. See Gov't C.A. Br. 22-23. For present purposes, however, the point is that *Reckmeyer* is distinguishable because it involved materially different facts and a different theory of traceability, and was also premised on a bona fide purchaser theory that petitioner disclaimed below.

Even if the result in this case conflicted with *Reckmeyer*, it would not warrant review. As noted, *Reckmeyer* is an older case that involved unusual facts, including the seizure of all of the defendant's assets. See *Reckmeyer*, 836 F.2d at 205-206. Moreover, this case would provide a poor vehicle for considering the alleged conflict, because the petition relies on a bona fide purchaser for value rationale that the court of appeals did not consider because petitioner had conceded that he was not a bona fide purchaser. See pp. 7-8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney

NOVEMBER 2007

11

No. 07-129

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In The

Supreme Court of the United States

MOUSTAFA ELDICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

ROBERT S. GRISCTI, ESQ.
Counsel of Record
LAW FIRM OF ROBERT S. GRISCTI, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(352) 375-4460
Attorney for Petitioner Moustafa Eldick

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY BRIEF

In the argument of its Brief in Opposition, the United States maintains the question presented in this case is "[w]hether the petitioner has standing under 21 U.S.C. 853(n)(2) to contest the criminal forfeiture of property that represents the proceeds of another person's crimes." (Brief in Opposition at (I)). This statement signals the fundamental misconception of the Government in this case that the properties forfeited were, in fact, the proceeds of the criminal defendant Mahmoud Eldick's criminal activity. The Government's own evidence demonstrates that, by any measure, the seizures of the partnership's property exceeded the fruits of the defendant's crime. See the Petition for Rehearing in the Court of Appeals, 7-8 (citing testimony and evidence before the District Court on summary judgment, and the Government's Answer Brief below). In this case, the properties forfeited represent the proceeds of petitioner Moustafa Eldick's lawful medical practice that were entusted to his brother Mahmoud Eldick.

Nor was it ever correct, as the Government now repeats to this Court, that the criminal defendant Mahmoud owned the partnership outright, reducing petitioner Moustafa, the legitimate partner, to an unsecured creditor of his own medical practice. Again, the Government's own evidence demonstrates that defendant Mahmoud and petitioner Moustafa "were partners in the operation of the practice" and that petitioner actually generated most of the income as legitimate earnings. Pet. for Reh. 7-8, 14.

Due process requires that petitioner, who knew nothing of his brother's fraud, be afforded a hearing instead of an exercise in semantics, which so far has trumped petitioner's substantive property rights. By summary judgment motion, petitioner pleaded his claim to the legitimate assets of his

own partnership, a claim superior to any the government could conceivably claim, persisting despite the promises implied but now broken by his former partner. Though the equities were clear and straightforward, the District Court's analysis quietly divested petitioner of his status as an owner of the partnership and treated him instead as the victim of a breached contract. The Court of Appeals repeated this misunderstanding, assuming that the criminal defendant owned the partnership and treating this petitioner as simply another victim of the defendant's fraud.

At a minimum, petitioner should be afforded his right to establish by evidence in a hearing that the properties the Government has seized legitimately belong to him. Splitting hairs at summary judgment to deny petitioner even the standing to present such evidence in a case where the Government cannot justify the sweep of its seizure denies this petitioner due process of law and awards the Government a windfall. This is inconsistent with this nation's tradition of carefully scrutinizing forfeitures.

This Court should exercise its supervisory power and require that petitioner's claim to contest the forfeiture of his properties not end in a departure from the acceptable course of judicial proceedings.

Respectfully submitted,

ROBERT S. GRISCTI, ESQ.
Counsel of Record
LAW FIRM OF ROBERT S. GRISCTI, P.A.
204 West University Avenue, Suite 6
Gainesville, Florida 32601
(352) 375-4460
Attorney for Petitioner Moustafa Eldick

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